No. 15210

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RENNIE & LAUGHLIN, INC., a Corporation,

Appellant,

vs.

CHRYSLER CORPORATION, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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Introduction.

In this Brief, plaintiff will reply to defendant's arguments in the order in which they appear in Appellee's Brief.

I.

The District Court Was in Error in Dismissing the Amended Complaint and the Action.

This is not a proper case for the application of Rule 12(b)(6) of the Federal Rules of Civil Procedure. In the case cited by defendant, *DeLoach v. Crowley's, Inc.* (5 Cir. 1942), 128 F. 2d 378, the court reversed a judgment dismissing the complaint, stating at page 380:

> "Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which

> the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings. Demurrers are abolished. A petition may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. But the principle is no longer of force that the pleadings will be construed strictly against the pleader. Rule 8(f) says that 'all pleadings shall be so construed as to do substantial justice.' "

and in *Continental Collieries v. Shober* (3 Cir. 1942), 130 F. 2d 631, the court in reversing the judgment dismissing the complaint stated at page 635:

> ". . . there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim. . . . No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it."

Plaintiff has alleged in his complaint a breach of a contractual duty by defendant and is entitled to a trial on the merits of the case.

II.

The Amended Complaint Alleges a Breach of Contract.

In its amended complaint, plaintiff has clearly alleged a breach by defendant of the 1949 agreement [Ex. A]. It is plaintiff's contention that when defendant consented to the assignment of the contract it became obligated to render performance to the assignee, and that its subsequent

indication that it would refuse performance to the assignee by stating to plaintiff and the assignee that it had revoked its consent to the assignment constituted a breach of the contract. It is obvious that when defendant required plaintiff to obtain its consent to an assignment of the contract, it also promised that if the consent were obtained it would render performance to the assignee under the terms of the contract. Any other construction would render the requirement of obtaining defendant's consent meaningless. It would be futile to require plaintiff to obtain defendant's consent, but leave defendant in the position of being able, after it had given its consent, to then determine whether it wanted to perform under the contract or not.

Admittedly, defendant did not expressly promise in the 1949 agreement to render performance to an assignee of the contract, but such a promise is implicit in the contract. As Judge Cardozo said in a leading case of *Wood v. Lucy, Lady Duff-Gordon,* 222 N. Y. 88, 118 N. E. 214:

> "We think, however, that such a promise is fairly to be implied. The law has out-grown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be, 'instinct with an obligation,' imperfectly expressed. (Scott, J., in *McCall Co. v. Wright,* 133 App. Div. 62, 117 N. Y. S. 775; *Moran v. Standard Oil Company,* 211 N. Y. 187, 198, 105 N. E. 217.)"

The Civil Code of California provides in respect to the interpretation of contracts as follows:

> §1655. *Reasonable stipulations, when implied.* Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in re-

spect to matters concerning which the contract manifests no contrary intention.

§1656. *Necessary incidents implied.* All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.

See also:

United States v. Outer Harbor Dock & Wharf Company (D. C. S. D. Cal. 1954), 124 Fed. Supp. 337.

Defendant is attempting to confuse the issues when it states in the first paragraph on page 8 of its brief that plaintiff must plead that defendant had an obligation to consent to the assignment. Defendant was under no obligation to do so, and plaintiff freely admitted that fact on page 5 of its brief. Plaintiff does contend that once having consented to the assignment, defendant was then obligated to render performance to the assignee and could not revoke its consent without breaching the agreement.

Nor does plaintiff seek any affirmative rights under a theory of waiver as contended on page 10 of defendant's brief. Plaintiff raises the theory of waiver, in the words of defendant, to eliminate "a defensive claim interposed by a defendant." In other words, plaintiff contends that the defendant cannot defeat plaintiff's claim by showing that the contract required defendant's consent to an assignment to be in writing, because by its actions in actively procuring the assignees, it had waived the requirement of written

consent. Plaintiff, therefore, is invoking the principle of waiver for exactly that purpose for which defendant contends it can be invoked.

That defendant's contention in the second paragraph of page 8 in its brief that the assignment of the 1949 agreement and plaintiff's sale of its business were unrelated, is completely unrealistic. The sale of a dealership for Chrysler products, even though it may include a lease, equipment or other property, without the transfer of a distributorship agreement with Chrysler, is as barren as playing *"Hamlet* without Hamlet."

III.

Reply to Appellee's Point III.

Plaintiff has never contended that it is basing any of its rights in this suit on the 1952 agreement.

IV.

Promissory Estoppel Can Be Applied to This Case.

Plaintiff does not rest its case solely on the principle of promissory estoppel. As set forth above, plaintiff contends that defendant's obligation to render performance to an assignee arose out of the 1949 agreement; that having given its consent to an assignment, defendant was under a duty not to revoke the consent.

Plaintiff does contend that, even if this were not true, under the facts alleged in the amended complaint, plaintiff can show that defendant's consent to the assignment was binding because action of a substantial character was induced on the part of the plaintiff and "injustice can be

avoided only by enforcement of the promise." Paragraph VIII of the amended complaint [R. 62] alleges that plaintiff sought consent to the assignment because of its losses and because of the ill-health of plaintiff's president, and paragraph VII [R. 64] alleges that defendant's general sales manager admitted that the decision to revoke the consent was made in order to decrease the number of dealers in the area. It is obvious, then, that defendant used information in regard to plaintiff's economic condition which it obtained by ostensibly cooperating with plaintiff to procure a purchaser, to revoke the consent in the hope that plaintiff would be forced out of business and consequently, the number of dealers in the area would be decreased. The revelation to defendant of plaintiff's economic condition and the inability of plaintiff's president to participate in the management of plaintiff's business, constitute a substantial change of position on the part of plaintiff which was induced by defendant's consent to the assignment, and injustice to plaintiff can be avoided only by holding that the consent once given could not be revoked.

Defendant's contention that plaintiff did not rely on defendant's promise is utterly without merit. Paragraph X of the amended complaint [R. 63] alleges that plaintiff entered into negotiations with the purchasers referred to it by defendant, which negotiations resulted in a final sale of plaintiff's business with all terms of the sale agreed upon. All plaintiff's acts were done with the full knowledge and consent of those persons who executed the original agreement between defendant and plaintiff.

V.

Reply to Appellee's Point V.

Plaintiff believes that in accordance with Rule 8 of the Federal Rules of Civil Procedure, when all doubts are resolved in favor of the complaint's sufficiency, it has "stated a claim on which relief could be granted." *(Gruen Watch Co. v. Artists Alliance* (9 Cir. 1951), 191 F. 2d 700.) If this court, however, feels that more facts should be pleaded, then plaintiff requests that the order dismissing the action be reversed and that plaintiff be permitted to file an amended complaint.

Respectfully submitted,

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